

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
LITTLE MISSOURI RIVER BASIN ABOVE LITTLE BEAVER CREEK (39F)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Courtney Herefords

OBJECTOR: United States of America (Bureau of Land
Management)

CASE 39F-0499-R-2022

39F 128428-00

39F 140509-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claims 39F 128428-00 and 39F 140509-00 appeared in the Preliminary Decree for the Little Missouri River Basin (Basin 39F) issued May 6, 2021. These claims received issue remarks. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order.

Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims also received objections filed by the United States of America (Bureau of Land Management).

The Court consolidated these claims into Water Court Case 39F-0499-R-2022 on October 18, 2022. The Court scheduled an initial status conference for the parties to discuss how to proceed. Claimant did not attend the conference. The United States moved for Claimant's default, which the Court entered. The Court did not take action on the default. The United States requested a deadline by which it would file proposed modifications with supporting evidence.

The United States filed a response containing requests for modifications to Claim 39F 140509-00 on January 3, 2023. On January 5, 2023, the Court issued an order setting a Show Cause Deadline by which Claimant was to file information showing cause why the Court should not make the requested modifications to Claim 39F 140509-00. The Court did not receive any filings by the deadline.

The proceedings of this case and information discussed in this Master's Report may be found in the Court's Full Court Enterprise system.

FINDINGS OF FACT

1. Claim 39F 128428-00 appeared with the following issue remark:

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NENESE SEC 24 TWP 7S RGE 61E CARTER COUNTY.

2. Claim 39F 140509-00 appeared with the following issue remarks:

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

RESERVOIR RECORD AND POINT OF DIVERSION WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA

WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 48.9 TIMES THE CAPACITY OF THE RESERVOIR.

3. Objector requests the following modifications to Claim 39F 140509-00:

The United States' objection to the Claim would be resolved by the following

modifications to the place of use:

- Place of Use ID ("POU") No. 5, consisting of 5.00 acres of federal land in E2NESW Section 19, should be removed. Claimant does not have authority to irrigate federal land.
- POU No. 1 should be restored to 120.00 acres in Section 19 as originally claimed, and POU Nos. 2 and 3 should be removed. Currently, POU No. 1 is described as 69.00 acres in W2W2 Section 19, but none of the claim maps indicate a place of use in the W2W2. *See* pp. 8-9 of 18 in the claim file. The description of POU No. 1 also inaccurately includes federal land in the NWSW and overlaps with the description of POU No. 3 (36.00 acres in N2NW).
- Because POU No. 1 would be described as the entirety of Section 19, a remark should be added stating that the place of use does not include federal land.

4. The place of use of Claim 39F 140509-00 should be described as follows:

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 120.00 | | | 19 | 8S | 62E | CARTER |
| 2 | 10.00 | | E2SENW | 19 | 8S | 62E | CARTER |
| Total: | 130.00 | | | | | | |

The following information remark should be added to Claim 39F 140509-00:

PLACE OF USE DOES NOT INCLUDE FEDERAL LAND

5. Objector indicated during the initial status conference held on December 1, 2022 that Claim 39F 128428-000 contained a likely clerical error. The place of use lists

the Range as “62E” but all other legal land descriptions on the claim list the Range as “61E.”

6. The place of use Range of Claim 39F 128428-00 should be described as “61E.”

7. Claim 39F 140509-00 is for a water spreading right. Water spreading irrigation systems divert water based on availability rather than crop need. Often times the irrigator does not have control over how much water is diverted and dams are used to check or divert water. Reservoir storage capacity is not necessarily a limit on the volume of water used by such systems.

8. The issue remarks should be removed from these claims.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

4. The Water Court has the authority to hear all objections to the elements of any claim included in a Court issued Temporary Preliminary Decree or Preliminary Decree. Section 85-2-233, MCA.

5. The Water Court may issue sanctions against any party who fails to comply with a Court order. Sanctions may include dismissal or modification of a claim according to information before the Court. The sanction must be just. Rule 22, W.R.Adj.R.

CONCLUSIONS OF LAW

1. The Court may modify the above-captioned claim as a sanction pursuant to Rule 22, W.R.Adj.R. because Claimants did not participate in case proceedings or oppose United States' requests. The modifications are supported by information in the record which overcomes the prima facie status of the claim by a preponderance of the evidence.

2. The evidence in the record and the proposed changes provide the Court with a sufficient basis to resolve and remove each issue remark from the above-captioned claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
LITTLE MISSOURI RIVER, ABOVE LITTLE BEAVER CREEK
BASIN 39F

Water Right Number: 39F 128428-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: COURTNEY HEREFORDS
91 COURTNEY LN
BELLE FOURCHE, SD 57717 5202

Priority Date: DECEMBER 31, 1970

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** UNNAMED TRIBUTARY OF LITTLE MISSOURI RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | E2NESE | 24 | 7S | 61E | CARTER |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

| <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------------|----------------|------------|------------|------------|---------------|
| | E2NESE | 24 | 7S | 61E | CARTER |

Diversion to Reservoir: DIVERSION # 1

THE DAM EXTENDS INTO THE SENESE SEC 24 TWP 7S RGE 61E CARTER COUNTY.

Period of Use: MAY 1 TO DECEMBER 1

***Place of Use:**

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | | E2NESE | 24 | 7S | 61E | CARTER |

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
LITTLE MISSOURI RIVER, ABOVE LITTLE BEAVER CREEK
BASIN 39F

Water Right Number: 39F 140509-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: COURTNEY HEREFORDS
91 COURTNEY LN
BELLE FOURCHE, SD 57717 5202

Priority Date: DECEMBER 31, 1971

Type of Historical Right: USE

Purpose (use): IRRIGATION
Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 180.00 AC-FT
Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 130.00

Source Name: UNNAMED TRIBUTARY OF HORSE CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | SESWSE | 19 | 8S | 62E | CARTER |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

| <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------------|----------------|------------|------------|------------|---------------|
| | SESWSE | 19 | 8S | 62E | CARTER |

Diversion to Reservoir: DIVERSION # 1

Dam Height: 10.00 FEET

Depth: 8.00 FEET

Surface Area: 1.15 ACRES

Capacity: 3.68 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 120.00 | | | 19 | 8S | 62E | CARTER |
| 2 | 10.00 | | E2SENW | 19 | 8S | 62E | CARTER |
| Total: | 130.00 | | | | | | |

Remarks:

PLACE OF USE DOES NOT INCLUDE FEDERAL LAND